

AUG 22 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 77-197

DONALD SCHANBARGER,

Petitioner,

vs.

MARINE MIDLAND BANK-CENTRAL (Executor of
HARRIET HENDRY ESTATE),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS.

(Entitled by Petitioner as "Petition for a Writ of Cer-
tiorari to the New York State Supreme Court, Appel-
late Division of the Fourth Department")

BRIEF FOR RESPONDENT IN OPPOSITION.

JACK MANLEY

Attorney for Respondent

97 West Street

Ilion, N. Y. 13357

(315) 895-7771

Table of Contents.

	Page
Opinion	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
ARGUMENT:	
A. The Federal question asserted by petitioner is not presented by the record	5
B. Assuming that a Federal Question was presented it was insubstantial	6
C. The State Court judgment sought to be reviewed is supported by adequate non-federal grounds	7
CONCLUSION. For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied	8

ii.

TABLE OF CASES. ✓

	Page
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634	7
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236	5
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497	7
Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509	7
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312	7
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725	7
McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136	7
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390	5
Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803	5
Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389	7

iii.

Page

Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590	5
Tacon v. State of Arizona, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346	6
Utilities Insurance Co. v. Potter, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109	7

TABLE OF STATUTES.

United States Constitution, XIV Amendment	2
Judicial Code 28 U.S.C. Sec. 1257(3)	6
Supreme Court Rules—Rule 19	6

IN THE
Supreme Court of the United States

October Term, 1976.

No. 77-197

DONALD SCHANBARGER,

Petitioner,

vs.

MARINE MIDLAND BANK-CENTRAL (Executor of Harriet
Hendry Estate),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS

(Entitled By Petitioner As "Petition For A Writ Of
Certiorari To The New York State Supreme Court,
Appellate Division Of The Fourth Department")

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion.

The only opinion was that delivered by Surrogate's Court, Herkimer County, State of New York—the court of original jurisdiction. It is not officially reported but is appended to the Petition for a Writ of Certiorari (Pages A 1 to A 12).

Jurisdiction.

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. 1257 (3).

Question Presented.

Petitioner's Statement of the Cases and Issues Presented require re-framing of the question presented to read as follows:

Where a corporate fiduciary brings on a proceeding for judicial settlement of its account as Executor of a Will and petitioner, as a legatee, under the Will and party to the proceeding, presents a list of objections to the account all of which, except one, present non-federal issues for determination by the State court and the one excepted objection presents a federal issue of claimed deprivation of petitioner's Federal constitutional rights and petitioner prevents the State Court from passing thereon by stating, in substance, that the objection is there for purposes of an appeal, is the State court judgment supported by adequate non-federal grounds so as to require denial of the application for a writ of certiorari?

Constitutional Provisions Involved.

United States Constitution, Fourteenth Amendment:

"Section I * * * ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The statement of petitioner was prepared in disregard of the applicable principles of review that the federal questions sought to be reviewed were necessarily involved in the case; that they were properly presented to the State Court in accordance with State practice and lastly, whether the State Court judgment sought to be reviewed is supported by adequate nonfederal grounds.

Respondent, Marine Midland Bank-Central, was appointed Executor of the Will of testatrix on September 18, 1973. In June, 1975 the executor brought a proceeding to settle its final account. Petitioner was one of the three legatees cited to appear in the proceeding (R.A. 26-29.* Petitioner appeared and filed objections to the Account (R.A. 39-41). Nine grounds were stated as the basis of the objections. The eighth objection is the only one that might possibly be construed as presenting a federal question to Surrogate's Court. The precise language of the objection was as follows:

"8. Articials [sic] 3. Section 2. jurisdiction clause and 6. supremacy clause of the federal CONSTITUTION are assured [sic] with question of WHETHER A STATE COURT THAT FAILS TO COMPELL A FIDUCIARY UNDER ITS SUPERVISION TO MAKE GOOD LOST PURCHASING POWER OF FUNDS UNDER THEIR CONTROL THAT COULD HAD BEEN DISTRIBUTED TO LEGATEE BEFORE LOST VALUE AND DAMAGES INCURRED [sic] FOR FAILURE TO DISTRIBUTE, VIOLATES THE PROHIBITED STATE CONDUCT, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14th AMENDMENT OF THE FEDERAL CONSTITUTION, WHEN PREDICTABLE INFLATION RUNS OVER 10% AND THE COST TO A LEGATEE TO GET A LOAN TO HAVE FUNDS THAT COULD AND SHOULD HAD BEEN DISTRIBUTED TO LEGATEES FOR INVESTMENT AND/OR ENJOYMENT COULD RUN AS MUCH AS 25%?"

*References are to pages in Record on Appeal, Appellate Division, Supreme Court, Fourth Department.

Upon the return date of the citation petitioner appeared without counsel and a dialogue ensued between the Court and petitioner a transcript of which is in the record (R.A. 1-19). The Surrogate then proceeded to discuss with petitioner each of the nine items in the objections to the account.

Significantly, when the court reached the heretofore set forth objection numbered eight petitioner summarily prevented any discussion thereof by stating "(Objection numbered) 8. Question for appeal" and passed to a discussion of the next objection—number 9 (R.A. 17).

It thus becomes clear that no federal constitutional question was before the Court and objection numbered eight had been interposed in the case by petitioner for in his words "question for appeal". Stated otherwise, petitioner apparently believed that if he made brief reference in his objections to some portion of the Federal Constitution this would suffice as the open sesame to this Court if he should be unsuccessful in the State courts.

In this, petitioner, of course, was mistaken for as we shall show, the federal question asserted must be necessarily involved in the case in the State Court, such question must be substantial and, alternatively, the State Court judgment sought to be reviewed may not be sustained on non-Federal grounds.

Returning to the record—the colloquy between the Court and petitioner shows that the latter was afforded every opportunity to furnish proof as to any of the objections but declined to do so. Eventually the matter was adjourned to give the Executor time to furnish additional information relating to objection numbered one—ownership of realty by testatrix (R.A. 18-19).

Thereafter the Executor submitted a detailed report thereon in the form of Executor's Reply to Objections (R.A. 42-46).

The Surrogate discussed the objections in an opinion that discussed in considerable detail the objections (R.A. 48-53). Petitioner appealed from the decree (R.A. 59) and on December 10, 1976 the Appellate Division, Fourth Department, unanimously affirmed the decree "for the reasons stated in the Memorandum" of Surrogate's Court.

Petitioner thereafter moved in the Court of Appeals for permission to appeal thereto from the Order of affirmance of the Appellate Division. In his affidavit in support thereof, petitioner routinely quoted the heretofore discussed objection numbered 8 and stated that the constitutional question had been "raised in all Courts". (Moving papers in Court of Appeals, pg. 4). On March 28, 1977 the Court of Appeals denied leave to appeal.

ARGUMENT.

A.

The Federal question asserted by petitioner is not presented by the record.

Newsome v. Smyth, 365 U.S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;
Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;
Erie Railroad Co. v. Kirkendall, 266 U.S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions support the well recognized principle that the grounds presented in a petition for certiorari must have a solid basis in the record and that the federal questions were necessarily involved in the case. The record herein demonstrates that such proof is absent therefrom.

Petitioner, apparently with knowledge that a federal issue could not be raised for the first time in this Court (*Tacon v. State of Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346), carefully asserted the federal constitutional question in his list of objections but, as heretofore shown, rejected the attempt of the Surrogate to pass thereon and stated, in substance, that the objection was there for purposes of an appeal. The result is that not only was the federal question not properly presented for the State Court to pass thereon but the procedure is shown to have been a sham for the purpose of the present application.

B.

Assuming that a Federal Question was presented it was insubstantial.

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

McClanahan v. Moraver & Hartzell, 404 U.S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;
Palmieri v. State of Florida, 393 U.S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;
Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;
Honeyman v. Hanan, 302 U.S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

C.

The State Court judgment sought to be reviewed is supported by adequate non-federal grounds.

Where the decision of a State Court is based on both federal and non-federal grounds, there is no opportunity for review by this Court if the non-federal grounds are themselves adequate to support the judgment.

Harris v. Zion's Savings Bank & T. Co., 313 U.S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;
Utilities Insurance Co. v. Potter, 312 U.S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;
Johnson v. Thornburgh, 276 U.S. 601, 48 S. Ct. 322, 72 L. Ed. 725;
George O. Richardson Machinery Co. v. Scott, 276 U.S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

There was presented herein to the State Court a routine application by an Executor for the judicial settlement of its account. Petitioner, as a legatee, appeared and filed objections to the account. The objections were carefully considered by the Surrogate. Petitioner was given an opportunity to submit proof but rejected the offer. The Executor submitted detailed proof in reply to the single objection that appeared to have prima facie merit. Thereafter, the Surrogate in a lengthy and carefully reasoned opinion dismissed all of the objections.

The Appellate Division, Fourth Department, on appeal, unanimously affirmed the decree and the Court of Appeals denied leave to appeal to that Court.

Petitioner has had his day in Court and the grant of a writ of certiorari herein would, in substance, present to this Court only the correctness of the judgment of the State Court based upon non-federal grounds.

CONCLUSION.

For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JACK MANLEY,
Attorney for Respondent,
97 West Street,
Ilion, N. Y. 13357
(315) 895-7771.